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No. 109

In the
Supreme Court of the United States
October Term, 1970

TIME, INCORPORATED,
Petitioner,

vs.

FRANK PAPE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING

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The Scheffer Press, Inc.—ANdover 3-6850

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Now comes the Respondent-Plaintiff, Frank Pape, and respectfully prays that this Court grant a rehearing in the above-entitled cause because the Court misapprehended the following points in its opinion of February 24, 1971.

1. In its Opinion the Court states:

> ". . . and in cases involving the area of tension between the First and Fourteenth Amendments on the one hand and state defamation laws on the other,

> we have frequently had occasion to review 'the evidence in the . . . record to determine whether it could constitutionally support a judgment' for the plaintiff" (Citations).

This Court thereupon goes through a lengthy review of the entire publication of the United States Civil Rights Commission entitled *Justice* and finally concludes;

> "To permit the malice issue to go to the jury because of the omission of a word like 'alleged' despite the context of that word in the Commission report and the external evidence of the report's overall meaning would be to impose a much stricter standard of liability on errors of interpretation or judgment than on errors of historic fact."

In making its analysis and in justifying its conclusion this Court went beyond the record in this cause. Nowhere in this cause was the entire publication *Justice* admitted into evidence or offered into evidence by any party. The only parts of the publication *Justice* that are a part of the record below are Defendant's Exhibit E consisting of the cover, an introduction, a list of members of the Commission, an excerpt from the foreword, an excerpt from page 1, excerpt from page 5, two headings from page 6, heading from page 12, heading from page 18, the Monroe-Pape case on pages 20 and 21, and certain excerpts of Father Hessberg on pages 166 and 168.

This court obviously went to the document *Justice* itself, independent of the record, and based its conclusion aforesaid on portions of *Justice* never presented by anyone in the Court below. This Court on page 7 of its Opinion refers to many incidents included in *Justice*, which were clearly designed to shock, anger and alarm the reader, indeed move him into the position of support of spe-

cific recommendations of the Commission. Yet the only incident which was a part of the record in the Court below was the Monroe-Pape incident and nowhere were those portions of *Justice* made a part of the record which concerned the conclusions of the Commission. The Court quotes copiously from pages 1 and 3 of *Justice* which were not a part of the record below. The Court relies heavily in reaching its conclusion on an incident in *Justice* involving the killing of a Negro in Georgia and the killing of a Negro in Cleveland and quotes from page 11 of Justice, but neither of these incidents in *Justice* were a part of the record in this cause. It also quotes from the conclusions of the Commission at pages 109-112, but such pages of *Justice* were never made a part of this record.

Usually courts of review confine themselves to enunciating propositions of law and do not concern themselves with an analysis of facts. In the instant case this Court chose to abandon this usual and ordinary procedure and to review the evidence in the record. In so doing this Court should have stayed with the record and not sought out evidence not a part of the record. The question here presented to the Court is whether or not there was sufficient evidence from which a fairminded jury could find the Defendant guilty of malice. Evidence not presented to such jury cannot persuade a Court of review that the evidence below was insufficient.

This Court at page 10 of its Opinion states:

> "In the light of the totality of what was said in *Justice* we cannot agree that, when Time failed to state that the Commission in reporting the Monroe incident had technically confined itself to allegations of a complaint, Time engaged in a 'falsification' sufficient in itself to sustain a jury finding of 'actual malice'."

But neither this Court nor any court can consider a total book not offered in evidence.

Exclusive of head notes, covers, lists of members and the like, the only portions of *Justice* in the record are as follows:

> "The United States Commission on Civil Rights was created by the Civil Rights Act of 1957 as a bipartisan agency to study civil rights problems and report to the President and Congress. Originally created for a 2-year term, it issued its first comprehensive report on September 8, 1959.
>
> "On September 14, 1959, Congress extended the Commission's life for another 2 years. This is the fifth of five volumes of the Commission's second statutory report."

> "The Commission has been disturbed by persistent reports of unconstitutional and violent acts by some agents of justice in the United States.
>
> "After an extensive review of these allegations and the entire field of administration of justice, the Commission authorized a study of three problems: (1) police brutality and related private violence; (2) the Civil Rights Acts and their enforcement; and (3) jury exclusion."

> "The Commission's study of the administration of justice concentrates on police brutality—the use of unlawful violence—against Negroes. Complaints and litigation suggest four subdivisions of the problem. The first involves the use of racially motivated brutality to enforce subordination or segregation. The second, a not altogether separate category, entails violence as a punishment. The third relates to coerced confessions. The last and largest entails the almost casual, or spontaneous, use of force in arrests. Only the first category necessarily involves

racial discrimination. In the others it may, or may not, be present, but Negroes are the victims with disproportionate frequency.

"In the text of this chapter the Commission briefly describes the alleged facts in 11 typical cases of police brutality. They are presented in the belief that they contribute to an understanding of the problem. The allegations of misconduct are supported in several cases by criminal convictions or findings by impartial agencies; in others, by sworn testimony, affidavits from eye witnesses, or by staff field investigations. In no case has the Commission determined conclusively whether the complainants or the officers were correct in their statements. This is the function of a court. The Commission is of the opinion, however, that the allegations appeared substantial enough to justify discussion in this study."

"*Search, seizure, and violence: Chicago, 1958.*— The Supreme Court of the United States decided the case of *Monroe* v. *Pape* on February 20, 1961. Although this decision did not finally dispose of the case, it did permit the Plaintiff to sue several Chicago police officers for violation of the Federal Civil Rights Act on the basis of a complaint which alleged that:

> . . . . (O)n October 29, 1958, at 5:45 a.m., thirteen Chicago police officers led by Deputy Chief of Detectives Pape, broke through two doors of the Monroe apartment, woke the Monroe couple with flashlights and forced them at gunpoint to leave their bed and stand naked in the center of the living room; that the officers roused the six Monroe children and herded them into the living room; that Detective Pape struck Mr. Monroe several times with his flashlight calling him "nigger" and "black boy"; that another officer pushed Mrs. Monroe; that other officers hit and kicked several of the children and pushed them to the

> floor; that the police ransacked every room, throwing clothing from closets to the floor, dumping drawers, ripping mattress covers; that Mr. Monroe was then taken to the police station and detained on "open" charges for ten hours, during which time he was interrogated about a murder and exhibited in lineups; that he was not brought before a magistrate, although numerous magistrate's courts were accessible; that he was not advised of his procedural rights; that he was not permitted to call his family or an attorney; that he was subsequently released without criminal charges having been filed against him."

> "Personally, I don't care if the United States gets the first man on the moon, if while this is happening on a crash basis, we dawdle along here on our corner of the earth, nursing our prejudices, flouting our magnificent Constitution, ignoring the central moral problem of our times, and appearing hypocrites to all the world."

Under the Court's theory of this case this is the total of *Justice* that can be considered. It is submitted that from such total evidence from *Justice* in the record, one could only conclude that the Commission was reporting allegations of a complaint and that Time, when it translated such allegations into findings of fact, committed a known falsity and was guilty of malice.

2. In its Opinion this Court relies on the fact that the researcher of the Time story believed that the Commission took the charges against Pape to be true (pages 5, 6 and 10). Nowhere in the record in this cause did the researcher state that she believed the Time article to be true or that she believed the Commission felt the charges against Pape were true. If this Court is to review the record on the trial, it must be bound by such record.

3. In its Opinion this Court engages in the lengthy process of weighing the evidence in the trial court and thus abandons the time-honored principle that a case should not be taken from the jury on motion from directed verdict if there is any evidence from which a fair-minded jury might find for the non-moving party. In so doing this Court sacrifices not only the right of an individual to his privacy and to be let alone, but also the right to trial by jury on the altar of press freedom.

4. In its opinion this Court attempts to limit its opinion to the facts of this particular case, which abandons the time-honored principles governing this Court on Writs of Certiorari. On such writs this Court only considers a matter in order to resolve conflicts of propositions of law between other opinions of this Court, opinions of the various circuits or to resolve conflicts involving important constitutional questions; by its limitation of its opinion to the facts of this case this Court attempts to limit this precedent only to a weighing of the facts which usually is the function of a jury.

5. By this opinion mere protestations of good faith by an author are capable of defeating any libel action contrary to this Court's previous holding in *St. Amant* v. *Thompson*, (390 U.S. 727).

Respectfully submitted,

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Frank Pape

DATED: MARCH 18, 1971

CERTIFICATE OF ATTORNEY

PATRICK W. DUNNE, being first duly sworn, on oath deposes and says that he is the attorney in charge of the prosecution of the above-entitled cause; that he is familiar with all of the facts and the law involved in the above-entitled cause; that the above Petition for Rehearing is presented in good faith and is not for the purpose of delay.

/s/ Patrick W. Dunne
PATRICK W. DUNNE
33 North Dearborn Street
Chicago, Illinois 60602

SUBSCRIBED and sworn to before me this 18th day of March, A.D., 1971.

/s/ Bernadette M. Mika
NOTARY PUBLIC

(SEAL)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

TIME, INC. *v.* PAPE

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 109. Argued December 16, 1970—Decided February 24, 1971

In a discussion of "police brutality and related private violence" in its 1961 Report, the Civil Rights Commission mentioned the case of *Monroe* v. *Pape*, 365 U. S. 167, and listed some of the allegations of Monroe's civil rights complaint filed against certain Chicago policemen headed by Deputy Chief of Detectives Pape. In an article about the Report, Time magazine quoted from a summary of the complaint, without indicating that the charges were Monroe's and not the independent findings of the Commission. Pape sued the petitioner publisher for libel. The Court of Appeals reversed the District Court's grant of Time's motion for summary judgment, holding that there had to be a trial on the question of whether Time's failure to make clear that it was reporting no more than allegations showed "actual malice" (knowledge that the information was false or reckless disregard of whether it was false or not) under the rule of *New York Times Co.* v. *Sullivan*, 376 U. S. 254. At the trial the author of the article and the researcher admitted awareness that the wording of the Report had been significantly altered but insisted that its real meaning had not been changed. The District Court granted Time's motion for a directed verdict at the close of the evidence, but the Court of Appeals reversed, holding that the jury should determine whether the omission of the word "alleged" showed "actual malice." Both courts agreed that Pape was a "public official" and that the article concerned his "official conduct." *Held:* In the circumstances of this case the magazine did not engage in a "falsification" sufficient in itself to sustain a jury finding of "actual malice." Pp. 5–13.

(a) The magazine's omission of the word "alleged" amounted to the adoption of one of several rational interpretations of a document bristling with ambiguities, and while that choice might